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IN THE

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, *et al.*,

Petitioners,

v.

ALEXANDRIA WOMEN'S CLINIC, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS

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STATEMENT OF THE ISSUE DEALT WITH HEREIN

Does Section 1985(3) protect a "right to abortion" against violation by private parties which is alleged to afford an alternate ground for affirming the court below?

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BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS

INTEREST OF AMICI[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the primary promoters of laws restricting abortion on demand to only those instances in which mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within the limits set by these decisions and have sought, through lawful means, those changes in the law which would allow full legal protection for the unborn. The National Right to Life Committee, Inc. seeks to advance its interests by addressing the legal issues herein.

The Christian Life Commission of The Southern Baptist Convention is the agency of the Convention charged by the

[1] This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

Convention with assisting Southern Baptists in understanding the moral demands of the Christian faith and helping Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention, the nation's largest Protestant denomination, with 38,000 congregations and 15 million church members, has assigned the Christian Life Commission of the Southern Baptist Convention the specific task of addressing issues such as abortion.

SUMMARY OF ARGUMENT

The Respondents have claimed that the "right to abortion," like the right to travel, is protected by Section 1985(3). However, this Court has declared that the "right to abortion," whatever its appropriate constitutional weight, is found within the Fourteenth Amendment, and thereby is protected only against state action. The Respondents admit that no state action is present in this case.

Respondents argue that the Ninth Amendment provides alternate constitutional grounds for recognizing a "right to abortion" which would protect women seeking abortions from even private interferences with abortion. However, the Ninth Amendment's retained rights cannot be a new source of fundamental constitutional rights. This is true because (1) the principle purpose of the Ninth Amendment was to avoid an implied extension of federal power due to the ratification of the Bill of Rights; (2) retained rights cannot prevail over the delegated powers of the federal government; and (3) the federal courts are not empowered to enforce retained rights against the states.

This Court has determined that Section 1985 is not a source of substantive rights, it only provides a remedy for the violation of fundamental constitutional rights found elsewhere. This Court distinguishes between fundamental rights and mere liberty interests. It is clear from the language of the Act itself and this Court's precedent in *Griffin v. Breckenridge* that Section 1985(3) only protects fundamental constitutional rights, not liberty interests. Section 1985(3) cannot be invoked

to protect mere personal or property interests without the violation of fundamental constitutional rights.

This Court's decisions in *Webster*, *Hodgson*, and *Ohio* reveal that the right to abortion is no longer considered by the majority of this Court to be a fundamental right. Therefore, abortion is not of sufficient constitutional weight to merit protection under Section 1985(3). This Court's determination that abortion is a mere liberty interest is consistent with this Court's tests for determining which rights are properly deemed fundamental.

For these reasons this Court should find that Section 1985(3) does not protect abortion from interference by private parties.

ARGUMENT

I. The Alleged Violation of the "Right to Abortion" by Petitioners Was Claimed Below as an Alternate Ground for Affirming the Court Below.

The Respondents claimed before the Fourth Circuit that "by blockading clinics, defendants prevented women from exercising their constitutional right to choose to have abortions. This right, like the right to travel, is protected by Section 1985(3). The [sic] point affords an alternative ground for affirming the finding of a Section 1985(3) violation." Brief for Appellees and Cross-Appellants at 19, *National Organization for Women v. Operation Rescue* (4th Cir.) (Nos. 90-2606, 90-2607 & 90-2651). This *amicus curiae* brief seeks to address this issue, in the event that Respondents make this claim before this Court.

II. The "Right to Abortion" is Only Protected Against State Action, Which is Not Alleged Herein.

This Court has declared that the "right to abortion," whatever its appropriate constitutional weight, is found within the Fourteenth Amendment and, thereby, is protected only

against state action. It is not, as Respondents argue, a Ninth Amendment right against intereference by private persons.

A. *The Right to Abortion, under* Roe v. Wade, *is a Fourteenth Amendment Right Against State Action.*

The right to abortion, under *Roe v. Wade*, 410 U.S. 113 (1973), is a Fourteenth Amendment right against government interference with the abortion decision, not a right against all interference. In this case the Respondents admit that there is no state action. However, state action is a necessary element of any claim for violation of the abortion right. This can be demonstrated in three ways.

First, since *Roe v. Wade*, the right to abortion has always been held to be a right arising under the Fourteenth Amendment. In *Roe* this Court declared the Texas abortion statute to be a violation of the right of privacy "founded in the Fourteenth Amendment's concept of personal liberty." *Id.* at 153. In *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), this Court explicitly left *Roe*'s foundation in the Fourteenth Amendment undisturbed:

> This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, [410 U.S.] at 164, and we leave it undisturbed.

109 S. Ct. at 3058.

Second, the whole thrust of the *Roe* decision was to free women from government interference in the abortion decision, at least during the first trimester: "This right of privacy . . . is broad enough to encompass a woman's decision whether to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." 410 U.S. at 153. The trend toward limitation of state action in regulating abortion is the major theme of *Roe*'s progeny. *See, e.g., Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v.*

Danforth, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *H.L. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 420 (1983); and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Third, the abortion funding decisions held that Roe was not implicated, therefore, the states need only show a rational basis for limiting funds for abortions. In *Maher v. Roe*, 432 U.S. 464, indigent women brought suit challenging a Connecticut regulation prohibiting the funding of abortions that were not medically necessary. Although failure to fund abortions for indigent women would limit their access to abortion, this Court held that the "Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." *Id.* at 469.

Similarly, in *Harris v. McRae*, 448 U.S. 1302 (1980), this Court upheld the constitutional validity of the Hyde Amendment which severely limits use of federal funds to reimburse the cost of abortions under the medicaid program. The Court held:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution.

Id. at 317-18.

From these decisions, it may be concluded that the abortion right created in *Roe* arises under the Fourteenth Amendment and that any violation of such right occurs only as a result of state action which constitutes an unwarranted interference with that right. Without state action, there is no violation of the

Fourteenth Amendment. Without a violation of the Fourteenth Amendment, there is no basis for a claim of violation of an abortion right and, therefore, no Section 1985(3) action by the Respondents.

B. *The Right to Abortion is Not a Ninth Amendment Right Against Interference by Private Parties.*

The Ninth Amendment declares: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In the court below, the Respondents argued that the Ninth Amendment contains a right to abortion that applies against purely private actors. Brief for Appellees and Cross-Appellants at 21-23, *National Organization for Women v. Operation Rescue* (4th Cir.) (Nos. 90-2606, 90-2607 & 90-2651). Your *amicus* addresses this argument in response to its anticipation of a similar argument to this Court.

The Ninth Amendment has been cited by this Court and others in support of the concept that there are other protected rights not enumerated in the Constitution. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("[T]here are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) ("[T]he Constitution's draftsment . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed." *Id.* at 579); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (alluding to the possibility that the right of privacy may be a right reserved to the people by the Ninth Amendment); *Buckley v. Valeo*, 424 U.S. 1, 59 n.67, 84 n.113 (1976) (per curiam) (campaign spending limits may implicate Ninth Amendment rights); and *Lubin v. Panish*, 415 U.S. 709, 721 n. (1974) (Douglas, J., concurring) (right to vote in state elections).

This *amicus* has no quarrel with the view that there are other protected rights not enumerated in the Constitution. *See*

generally Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duquesne L. Rev. 271 (1990). However, this *amicus* does dispute the concept that the Ninth Amendment protects unenumerated rights that conflict with the delegated powers of the federal government or that the Ninth Amendment limits the people's authority to constitute state governments.[2]

The natural meaning of the Ninth Amendment is that the Constitution's enumeration of certain rights does not deny, disparage, expand, or restrict the rights, unenumerated in the Constitution, that are retained by the people under state law. The words, history, and purpose of the Ninth Amendment demonstrate that it is not a "bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion." Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 2 (1980) (characterizing Justice Goldberg's concurrence in *Griswold*). It is, instead, a rule of construction that confirms that the federal government is one of limited powers, and that rights not delegated by the people to the federal government are not to be denied or disparaged simply because they are not enumerated in the Constitution. By definition, then, the "rights retained" do not overlap or trump granted federal powers, nor do they override state powers.

1. The Principal Purpose of the Ninth Amendment Was to Avoid an Implied Extension of Federal Power.

As sent to the states for ratification, the Constitution did not include a general bill of rights. This omission provoked considerable opposition to the ratification of the Constitution. *See* G. Wood, *The Creation of the American Republic 1776-1787* 536-43 (1969); E. Dumbauld, *The Bill of Rights and What It Means*

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[2] This section of this Brief draws heavily from the *Report to the Attorney General, Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause*, U.S. Department of Justice, Sept. 25, 1987, at 15-27, which is an excellent discussion of the purpose and intent of the Ninth Amendment.

Today 10-33 (1957). Two principal arguments were made in opposition to the addition of a bill of rights. First, it was argued that a bill of rights was unnecessary because the federal government was a government of limited, delegated powers. James Wilson explained in a widely republished speech that every power

> which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.

Speech of James Wilson (October 6, 1787), 13 *The Documentary History of the Constitution* 339-40 (1981).

Second, it was argued that the addition of a bill of rights would imply that all other rights and powers had been delegated to the federal government. Such an implication was inconsistent with the concept of a government of limited powers and therefore was to be avoided. James Wilson expressed it this way:

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an *enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

2 *Elliot's Debates* 436-37 (1836) (emphasis in original). *See also The Federalist, No. 84*, at 579-80 (Hamilton) (referring to a bill of rights as "dangerous" for this reason).

In order to secure its ratification by the states, the federalists agreed to amend the Constitution to include a bill of rights. James Madison proposed the amendments that eventually became the Bill of Rights. He defended his proposal which became the Ninth Amendment:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution . . . .

12 *Papers of James Madison* at 206. In this way Madison confirmed his understanding that his proposal operated as a restriction on the implied extension of federal powers.

2. The Retained Rights Do Not Prevail Over Powers Delegated to the Federal Government.

In his statement on the House floor introducing the resolutions that, with revisions, became the Bill of Rights, Madison spoke of the role of the courts in enforcing rights.

> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but does it not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be

> an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly *stipulated* for in the constitution by the declaration of rights.

12 *Papers of James Madison* 206-07 (emphasis added).

This contemporaneous explanation contemplates that courts will serve as an "impenetrable bulwark" against (1) unconstitutional expansions of power and (2) infringement of "expressly stipulated" rights in the Constitution. There is no suggestion that courts are to create and enforce exceptions to granted powers in favor of retained rights. Of course, if, as the traditional interpretation maintains, the retained rights are those not delegated to the federal government, then, to the extent courts are an "impenetrable bulwark" against every "assumption of power" beyond those granted the government, no other specific protection of retained rights is required.

The text, history, and purpose of the Ninth Amendment all demonstrate that retained rights do not prevail over delegated powers. Thus, the Respondents' argument that a right to abortion resides within the Ninth Amendment misinterprets the nature of the Ninth Amendment. This amendment has been traditionally understood to contradict the concept that the people have abandoned all rights not specifically granted to them in the Bill of Rights. Without the Ninth Amendment there was a concern that the Bill of Rights might be misinterpreted to be an implied extension of federal power.

For example, Justice Story explained that the Ninth Amendment "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." J. Story, *Commentaries on the Constitution of the United States* § 1905, at 624-25 (4th ed. 1873).

Edward Dumbauld, in his book, *The Bill of Rights and What It Means Today*, stated the purpose of the Ninth Amendment:

> The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. It was simply a technical proviso inserted to forestall the possibility of misinterpretation of the rest of the document . . . . It is destitute of substantive effect.

E. Dumbauld, *supra* 63-64.

Since this is true, then the retained rights referred to in the Ninth Amendment are simply those rights that remain after subtracting the powers delegated to the federal government from the original sovereignty of the people. Thus, retained rights are subordinate to the delegated powers of the federal government and cannot prevail over those delegated powers when they conflict.

Justice Reed stated this in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947): "[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth . . . Amendment[], the inquiry must be directed toward the granted power under which the action of the Union was taken. If the granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth . . . Amendment[], must fail." *Id.* at 95-96.

The purpose of the Ninth Amendment was not to expand the powers of the courts in determining the nature of these retained rights, the purpose was to limit the federal government to the powers expressly granted in the Constitution. Justice Black, in his dissent in *Griswold v. Connecticut*, 381 U.S. at 520, stated: "as every student of history knows," the Ninth "Amendment was passed, not to broaden the powers of this Court or any other department of 'the general government' but . . . to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."

Activists argue that the focus on rights, rather than powers, in the Ninth Amendment and in Madison's statement introducing his draft (quoted above), implies that the amendment means something more than that federal powers are limited.

Professor Ely, for example, after quoting Madison's explanation, contends "that even here Madison, though he may have linked them in a way that seems unnatural today, made both [points] that he wished to forestall both the implication of unexpressed powers and the disparagement of unenumerated rights. What is more important is that just as the Tenth Amendment clearly expresses the former point, the Ninth Amendment clearly expresses the latter." J. Ely, *Democracy and Distrust* 36 (1980) (emphasis in original). The point appears to be that unless retained rights trump granted powers, the Ninth Amendment is superfluous.

This argument depends upon the significance assigned to the use of the words "powers" in the Tenth Amendment and "rights retained" in the Ninth Amendment. The change in focus from "powers" to "rights retained" was the cause of some opposition to ratification. Hardin Burnley reported in a letter to Madison that what became the Ninth and Tenth Amendments were initially rejected by the Virginia Assembly. Governor Randolph led the opposition, arguing that it was not possible to determine which rights were retained by the people.

> His principal objection was pointed against the word *retained* . . . and his a[r]gument if I understood it was applied in this manner, that as the rights declared in the [first eight amendments] were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st. & 17th. amendments proposed by Virginia [which were predecessors to the Ninth and Tenth Amendments], that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.

Letter from Hardin Burnley to James Madison (November 28, 1789), 12 *Papers of James Madison* 456 (original spelling retained) (emphasis in original).

In a letter to George Washington, Madison responded to Randolph's argument, contending that it raised, in essence, a distinction without a difference.

> The difficulty [stated] against the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is still a greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.

Letter from James Madison to George Washington (December 5, 1789), 12 *Papers of James Madison* 459. Madison thus confirmed his understanding that, notwithstanding the reference to "rights" instead of "powers," the Ninth Amendment continued to operate as a restriction on the implied extension of federal powers.

Under Madison's and traditional interpretation, the Ninth Amendment is a companion to the Tenth Amendment and is not redundant. The Tenth Amendment affirms that powers not delegated to the federal government are reserved to the states and the people; in other words, it is a statement of who *possesses* undelegated powers. The Ninth Amendment, on the other hand, concerns the *location* of the line between delegated powers and retained rights, and commands that the line not be moved by virtue of the enumeration of some rights.

Some argue that the "rights retained by the people" refer to "natural rights," theories of which were popular among some at the time of the ratifications of the Constitution and the Bill of Rights, and that those unwritten "natural rights" trump powers. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 152 (1928); B. Patterson, *The Forgotten Ninth Amendment* 19-22 (1955); Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814, 816 (1966).

The Constitution, however, nowhere incorporates natural law or provides that natural, fundamental, or any sort of higher law is superior to it. To the contrary, as previously noted, article VI provides that the "Constitution," not some higher law principles, "shall be the supreme Law of the Land."

Furthermore, the "rights retained" by the people under the Ninth Amendment may be delegated to or waived as against a state. Thus, whether the right has been retained by the people as against a *state* depends upon the allocation of governmental powers and individual rights under that state's constitutional law. One would not look to the U.S. Constitution or the federal courts for their origin, description, or enforcement. Certainly, the rights retained by the people could be waived, limited or defined by state law and constitutions pursuant to the actions of the people or their constitutionally empowered legislative representatives. To assert, as the Respondents do, that the retained rights are now incorporated by the Fourteenth Amendment, including a right to abortion, and that federal courts are now under an obligation to protect such retained rights as against the states, transforms the Ninth Amendment into a restriction on the people's right to create state governments and to empower those states with such authority as they may constitutionally delegate to them.

Russell Caplan reaches a similar conclusion by focusing on the state-law basis of rights at the time of the Constitution's ratification. He argues that the "rights retained" in the Ninth Amendment refer only to state-based rights, that those state-based rights do not trump federal powers because of the Supremacy Clause, and that it is logically impossible to "incorporate" the Ninth Amendment through the Fourteenth against the states, because the amendment was intended to protect, not circumscribe, state-based rights and circumstances. Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, 260-62 (1983).

Therefore, the Ninth Amendment is not substantive in nature. It does not create rights, neither is it a source from which new rights may be created. It is simply a rule of construction, no more, no less. It cannot be the source of a right to abortion that is enforceable against interference by private actors. Thus it cannot be the basis for a constitutional right which activates Section 1985(3).

III. Section 1985 Provides a Remedy Only for the Violation of Fundamental Rights, Not Liberty Interests.

A. *This Court Distinguishes Between Fundamental Rights and Liberty Interests.*

The terms "fundamental right" and "liberty interest" are used in contra-distinction in this Court's plurality opinion in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989):

> The experience of the Court in applying *Roe v. Wade* in later cases . . . suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a *'fundamental right'* to abortion, as the Court described it in *Akron*, . . . a limited fundamental constitutional right,' which Justice BLACKMUN's dissent today treats *Roe* as having established, . . . or a *liberty interest* protected by the Due Process Clause, which we believe it to be.

Id. at 3058 (emphasis added) (citations omitted).

A clear explanation of how these two terms are used by the new Court majority is found in the opinions of Justice White and Chief Justice Rehnquist. Justice White, together with now-Chief Justice Rehnquist, were the original dissenters in *Roe v. Wade* and *Doe v. Bolton*, but are now in the Court's majority on abortion. *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting); *Roe* and *Bolton*, 410 U.S. at 221 (White, J., dissenting to both *Roe* and *Bolton*); *Doe*, 410 U.S. at 223 (Rehnquist, J., dissenting).

In *Roe*, now-Chief Justice Rehnquist explained the meaning of substantive due process liberty interests:

> [T]he "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that

> liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a *rational relation* to a valid state objective.

Roe, 410 U.S. at 172-73 (Rehnquist, J., dissenting) (emphasis added).

Justice White's dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), discussed the distinction between a fundamental right and a liberty interest:

> The Due Process Clause of the Fourteenth Amendment, which forbids the deprivation of "life, liberty, or property without due process of law," has been read by a majority of the Court to be broad enough to provide substantive protection against state infringement of a broad range of individual interests.
>
> * * *
>
> In most instances, the substantive protection afforded the liberty or property of an individual by the Fourteenth Amendment is extremely limited: State action impinging on individual interests need only be rational to survive scrutiny under the Due Process Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature. Only fundamental' rights are entitled to the added protection provided by strict judicial scrutiny of legislation that impinges upon them.

Id. at 789 (citation omitted) (White, J., dissenting).

It was in this context that Justice White made his sometimes misconstrued comment regarding an abortion liberty:

> I can certainly agree with the proposition — which I deem indisputable — that a woman's ability to choose an abortion is a species of "liberty" that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so "fundamental" that

> restrictions upon it call into play anything more than the most minimal judicial scrutiny.

Id. at 790.

Justice White's comment, that "abortion is a species of 'liberty,'" does not mean that he recognizes special constitutional protection for abortion. His view is stated clearly in *Thornburgh:*

> *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never — not in 1787, 1791, 1868, or at any time since done any such thing. I would return the issue to the people by overruling *Roe v. Wade*.

Id. at 796-97.

In sum, there is a clear distinction between "liberty interests" and "fundamental rights" under the liberty clause of the Fourteenth Amendment. As discussed below, only fundamental rights are protected under 1985(3).

B. *Section 1985 Only Protects Fundamental Constitutional Rights, Not Liberty Interests.*

Section 1985 provides no substantive rights itself; it merely provides a remedy for the violation of the fundamental constitutional rights. It does not protect mere liberty interests.

The wording of Section 1985(3) itself indicates that only fundamental constitutional rights are protected:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the *equal protection of the laws*, or of *equal privileges and immunities under the laws;* or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the *equal protection of the laws;* or if

two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to *vote*, from giving his *support or advocacy* in a legal manner, toward or in favor of the *election* of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any *right or privilege of a citizen of the United States*, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C.A. § 1985(3) (1871) (emphasis added)[3]

The rights specifically named in the statute are all fundamental constitutional rights, i.e., equal protection of the laws, equal privileges and immunities under the laws, the right to vote and to support or campaign for political candidates. In order to make sure that no fundamental right would be excluded, the statute specifically protects "any right or privilege of a citizen of the United States." The rights Congress sought to protect were those rights that were necessary to free participation in a political democracy. Those were the rights most in jeopardy in the period of Civil War Era Reconstruction.

The seminal case of *Griffin v. Breckenridge*, 403 U.S. 88 (1971) established this interpretation. *Griffin* involved the violent acts of Ku Klux Klan members in attempting to discourage black persons, whom they mistakenly thought were civil rights workers, from entering and working within the state of Mississippi. In *Griffin* this Court determined for the first time that the Ku Klux Klan Act, now encoded at 42 U.S.C.A. § 1985(3), extended to private conspiracies and that the Act was constitutional as applied under the Thirteenth Amendment and the constitutional power to protect the right of interstate travel. However, the Court did not see fit to include every possible violation committed by two or more persons within a state. Justice Stewart wrote:

> *That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others.* For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more persons within a State." [Cong. Globe, 42d Cong., 1st Sess. 485 (1871).]

Id. at 101-02 (emphasis added).

In reaching its conclusion, this Court identified "two constitutional sources" (*id.* at 107) relied upon to support a cause of action under Section 1985(3):

> We can only conclude that Congress was wholly within its powers under § 2 of the *Thirteenth Amendment* in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.
>
> * * *
>
> *Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental inter-*

[3] Section 1985(3) "as first enacted authorized both criminal and civil actions against those who have conspired to deprive others of federally guaranteed rights. Before the 19th century ended, however, the Court found the criminal provisions of the statute unconstitutional because they exceeded the scope of congressional power, [citations omitted], and the provisions thus invalidated were later formally repealed by Congress. The civil action provided by the Act remained, but for many years was rarely, if ever, invoked." *Great American Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366, 370-71 (1979).

> *ference.* [Citations omitted.] The "right to pass freely from State to State" has been explicitly recognized as "among *the rights and privileges of National citizenship.*" *Twining v. New Jersey,* 211 U.S. 78, 97 [1908]. That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation.

403 U.S. at 105-06 (emphasis added).

If the plaintiffs' physical injuries alone in *Griffin* were sufficient to invoke the protections of Section 1985(3), why did this Court rest its holding squarely on the Thirteenth Amendment and the fundamental constitutional right of interstate travel? It would not have done so unless the existence of a fundamental right was necessary to its holding.

This interpretation is also supported by Justice Powell's concurring opinion in *Great American Federal S. & L. Ass'n v. Novotny,* 442 U.S. 366, 378 (1979) (Powell, J., concurring). In *Novotny,* an action was brought by a former male employee, who alleged that his support for female employees was the cause of his discharge, contending that he had been injured as a result of a conspiracy to deprive him of equal protection of and equal privileges and immunities under the laws. *Id.* at 366. This Court held that the statutory right created by Title VII of the Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a),[4] could not be the basis for a cause of action under Section 1985(3). The Court's rationale was that only this holding could preserve the effectiveness of the administrative remedies provided for in Title VII.

Justice Powell concurred with the result reached in the majority opinion but felt that it failed to give proper guidance to the federal courts as to when Section 1985(3) may be invoked:

> I agree with the opinion of the Court as far as it goes, and I join it. I also agree with the views expressed by Mr.

[4] "Congress enacted Title VII of the Civil Rights Act of 1964 to assure equality of employment opportunities by eliminating those practices and devises that discriminate on the basis of race, color religion, sex or national

(footnote continued)

> Justice STEVENS' concurring opinion. I write separately because it seems to me that the Court's decision affords unnecessarily little guidance to courts in the federal system.

Id. at 378.

Justice Powell's reason for siding with the majority was that the reach of Section 1985(3) "is limited to conspiracies to violate *those fundamental rights derived from the Constitution.*" *Id.* (emphasis added). In support of this view he cites the holding and rationale of *Griffin.* He notes the "two constitutional sources" cited in *Griffin,* and quotes *Griffin*'s holding that the right of interstate travel, "like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation." Then he concludes stating:

> By contrast, this Court has never held that the right to any particular private employment is a "right of national citizenship," or derives from any other right created by the Constitution. Indeed, even Congress, in the exercise of its powers under the Commerce Clause of the Constitution, has accorded less than full protection to private employees. . . . Nor does the Constitution create any right to be free of gender-based discrimination perpetuated solely through private action.
>
> The rationale of *Griffin* accords with the purpose, history, and common understanding of this Civil War Era statute. *Rather than leave federal courts in any doubt as to the scope of actions under § 1985(3), I would explicitly reaffirm the constitutional basis of* Griffin.

Id. at 380-81 (emphasis added). Thus Justice Powell concludes that the precedent of this Court in *Griffin* requires the violation

Footnote 4 continued

origin. . . . To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974).

of a fundamental constitutional right before Section 1985(3) may be properly invoked.

Furthermore, the violations of Section 1985(3) that have been recognized by the federal courts have involved fundamental constitutional rights. *See, e.g., Griffin*, 403 U.S. 88 (interstate travel); *Skadegaard v. Farrell*, 578 F.Supp. 1209 (D.N.J. 1984) (sexual harassment under 14th Amendment); *Hunt v. Weatherbee*, 626 F.Supp. 1097 (D.Mass. 1986) (sexual harassment); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F.Supp. 165 (D.Or. 1988) (interstate travel); and *New York State National Organization for Women v. Terry*, 704 F.Supp. 1247 (S.D.N.Y. 1989), *aff'd as modified*, 886 F.2d 1339 (2nd Cir. 1989) (interstate travel).

For these reasons, the rights protected by Section 1985(3) are limited to fundamental constitutional rights, not mere liberty interests. Section 1985(3) cannot be invoked to protect mere personal or property interests without the violation of fundamental constitutional rights.

IV. Under This Court's Jurisprudence the Right to Abortion is Only a Liberty Interest, Not a Fundamental Right.

The right to abortion is no longer considered by this Court to be a fundamental right. This is evident from this Court's plurality and concurring opinions in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990).

In *Webster*, this Court upheld Missouri statutes (1) banning the use of public employees and facilities for the performance of abortion, except to save the life of the mother, 109 S. Ct. at 3053, and (2) requiring viability testing before abortions could be performed where the abortionist has reason to believe a woman is carrying an unborn child of twenty or more weeks gestational age. *Id.* at 3056. The Court also determined that federal courts could not consider (and reversed the lower

court's decision to do so) the preamble to the Missouri law, which made a legislative finding that individual human life begins at conception. *Id.* at 3050.

The pivotal change wrought by *Webster* in abortion jurisprudence was evident in the express analyses employed by a new majority of Justices on the Court. Compiling these analyses into a single analysis reveals that, after *Webster*, (a) "the unduly burdensome test ha[d] become the de facto standard of review in abortion jurisprudence," (b) there [was] no longer a "general, fundamental right to abortion," (c) "to the extent any abortion right [would be] recognized, the trimester scheme is defunct and states have compelling interests in unborn life and maternal health throughout pregnancy," and (d) "to the extent any fundamental right to abortion [would be] recognized, abortion regulations need no longer be narrowly tailored." *See* Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157, 159, 161, 162, 164 (1989). The key element of these changes is the fact that the abortion right has been demoted to a mere liberty interest. *Webster*, 109 S. Ct. at 3058 (plurality opinion of Rehnquist, C.J., and White and Kennedy, JJ.) (abortion characterized as "a *liberty interest* protected by the Due Process Clause, which we believe it to be" (emphasis added); 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in the judgment) (Justice Scalia wrote, "I . . . would [overrule *Roe*] more explicitly," thereby recognizing abortion as a liberty interest rather than a fundamental right.).[5]

Thus, the significance of *Webster* goes beyond the statutes which the Court upheld. A majority of this Court has now abandoned the key underpinning of the decision in *Roe v. Wade*, 410 U.S. 113 (1973)that there is a general "fundamental right to abortion." By so doing, the new majority has *sub silentio* overruled *Roe v. Wade*. *See* Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157.

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[5] Justice O'Connor, likewise, did not employ strict scrutiny, for her analysis does not treat abortion as a general fundamental right.

The profound change in abortion jurisprudence indicated by *Webster* is further apparent in this Court's latest decisions on abortion. These decisions, *Hodgson v. Minnesota*, 110 S. Ct. 2926, and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, confirm the radical change in abortion jurisprudence indicated by the Court's decision in *Webster*, 109 S. Ct. 3040.

In *Hodgson* and *Ohio*, five of the nine justices again treated abortion as a mere "liberty interest" rather than a "fundamental right." This is evident from the fact that these five justices required only a "rational basis" for the state's abortion statutes rather than a higher standard, as would be required if abortion were a fundamental right. *Ohio*, 110 S. Ct. at 2977, 2983-84 (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) ("The Statute in issue here is a rational way to further those ends."); *Ohio*, 110 S. Ct. at 2981 (The Court, including Justice O'Connor, referred to minors' abortion interest as a "liberty interest."); *Hodgson*, 110 S. Ct. at 2944 (Stevens, J., joined by O'Connor, J.) (the statute at issue "would reasonably further the legitimate state interest"); id. at 2945 (the Court) (the statute at issue "does not reasonably further any legitimate state interest"); id. at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part) ("It has been my understanding in this area that [i]f the particular regulation does not "unduly burde[n]" the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose. It is with that understanding that I agree with Justice Stevens' statement that the statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests.'" (citations omitted)).

The new Court majority, evident in *Webster*, *Hodgson*, and *Ohio*, therefore, treats abortion as only a liberty interest. Since abortion is no longer a fundamental right, it is no longer of sufficient weight to merit protection under Section 1985(3).

V. This Court Has *Properly Determined* That the Right to Abortion is a Mere Liberty Interest.

This Court has been criticized for its failure to justify its treatment of abortion as a liberty interest, not a fundamental right. Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83, 83-84 (1989). However, pursuant to this Court's precedent for such determinations, the right to abortion is properly characterized as a liberty interest.[6]

A. *This Court Applies an Historical Test to Determine Which Liberty Interests Rise to the Level of Being a Fundamental Right.*

To determine which liberty interests rise to the level of fundamental rights, this Court has employed two tests to assist in determining which rights are properly deemed "fundamental." As discussed below, the second test has come to be the one relied upon by the Court.

The first test asks whether an asserted fundamental right is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The second test asks whether a failure to recognize the asserted liberty interest as fundamental would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). These tests for fundamentality have been qualified in more recent cases to clarify precisely which history is relevant: an asserted fundamental right must be "necessary to an *Anglo-American* regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (emphasis added), or "deeply rooted in *this Nation's* history and tradition," *Moore v.*

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[6] Furthermore, the doctrine of *stare decisis* does not prevent this Court from overruling *Roe*'s holding that abortion is a fundamental right. *See generally* Bopp, Coleson & Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade? 1 Seton Hall Const. L. J. 55, 84-107 (1990).

City of East Cleveland, 431 U.S. 494, 503 (1977) (emphasis added).

This Court has relied increasingly on the "history and tradition" test as being more concrete and reliable. This is expressly stated in the case of *Duncan v. Louisiana*, 391 U.S. at 149-50 n.14, which the Court has described as "rejecting the *Palko* [implicit-in-the-concept-of-ordered-liberty] formula as the basis for deciding what procedural protections are required of a State, in favor of a historical approach based on the Anglo-American legal tradition." *Moore v. City of East Cleveland*, 431 U.S. at 504 n.12. In *Moore*, the Court noted that "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko v. Connecticut*." *Id.*[7]

The predominant reliance on the historical test is evident in the recent decisions of this Court involving asserted fundamental rights. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986) (The Court noted the fact that sodomy was historically a crime and held that the Constitution did not protect homosexual sodomy as a fundamental right). In applying the historical test, two factors must be kept in mind. The first factor is summarized in Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (a discussion often cited in the Court's discussions of the test for fundamentality), namely that the substantive content of the due process clause consists of "the balance which our Nation . . . has struck between . . . liberty and the demands of organized society." Id. at 542. It "is the balance struck by this county, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Id.*

[7] It is noteworthy that Justice White expressed reservations about the historical test in *Moore*, arguing that it "suggests a far too expansive charter for this Court and a far less meaningful and less confining guiding principle than [the implicit-in-ordered-liberty test] for serious substantive due process review. *Moore*, 431 U.S. at 549 (White, J., dissenting). However, by the time of *Bowers v. Hardwick*, 478 U.S. 186 (1986), he had adopted the majority analysis, employing it in the opinion he authored for the majority.

The second factor which must be considered is the way in which a proposed fundamental right is formulated prior to being submitted to the historical test for fundamentality. Members of the Court have debated the level of specificity at which a proposed fundamental right must be formulated before being tested by the historical test for fundamentality. For example, in the homosexual sodomy case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), the majority rejected a number of broad formulations of the proposed fundamental right, such as the right to do what one wishes "in the privacy of the home," *id.* at 195, or the right to engage in "voluntary sexual conduct between consenting adults," *id.*[8] Rather, the *Bowers* majority formulated the proposed fundamental right in a narrower, concrete, fact-sensitive manner, e.g., the right to engage in "consensual homosexual sodomy." *Id.* at 188 n.2.[9]

What this means for abortion jurisprudence is that the new majority on this Court has rejected the free-wheeling test of *Roe v. Wade*, which asks whether a right of privacy is "broad enough to encompass" a right to abortion, Roe, 410 U.S. at 153. Under the rejected *Roe* approach, this Court could simply determine that there is broad, undefined right of privacy and conclude that it is sufficiently broad to encompass abortion. Under such an approach, the Court could have as easily found a constitutional right to infanticide. Instead, the Court will now ask whether a right to abortion on demand is deeply rooted in this Nation's history and tradition.

[8] The *Bowers* dissenters employed ten different board and abstract formulations, such as the "right to be let alone," which could encompass nearly anything. *Bowers*, 478 U.S. at 199, 204, 205, 206, 208 211, 217.

[9] This is confirmed in the recent case of *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989). In *Michael H.*, the plurality formulated the proposed fundamental right as "the power of the natural father to assert paternal rights over a child born into a woman's existing marriage with another man." *Id.* at 2343 (plurality opinion). In so doing, the *Michael H.* plurality rejected the broad formulation by the dissenters which would ask whether "parenthood is an interest that historically has received our attention and protection." *Id.* at 2350 (Brennan, J., dissenting).

B. *Because Abortion Fails the Historical Test for Fundamentality, This Court's Majority Has Demoted the Former Abortion Right to a Liberty Interest, So That Legislation Restricting It Need Only Have a "Rational Basis."*

When the issue is framed as whether abortion on demand is deeply rooted in the history and tradition of our Nation, it is readily apparent that it was not. Therefore, there could properly be no fundamental right to abortion.

An examination of the history of legal restrictions on abortions reveals that abortion has been legally restricted throughout the history of our Republic until *Roe v. Wade* overturned the laws of the States. *Roe*, 410 U.S. 113. The history of abortion restrictions in Anglo-American common law and statutory law is discussed at great length by Professor Joseph Dellapenna. See Dellapenna, Brief of the American Academy of Medical Ethics, as *Amici Curiae*, *Minnesota v. Hodgson*, 110 S. Ct. 2926 (1990) (No. 88-1309); and Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979).

The history of abortion regulation in this country has been set forth concisely by now-Chief Justice Rehnquist in his dissent to *Roe v. Wade*, 410 U.S. at 174-77 (Rehnquist, J., dissenting) (listing the ubiquitous abortion statutes in the States). Justice Rehnquist summed up the implications of history for determining the fundamentality of a right to abortion: "The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 174.

This theme was revisited in oral arguments in the *Webster* case, when Frank Susman, attorney for Planned Parenthood, declared to this Court that an abortion right is "deeply rooted in this nation's history and tradition." *Transcript of Oral Arguments Before the Court on Abortion Case*, *N.Y. Times*, April 27, 1989, at B13, col. 2. Susman endeavored to establish this by defining the proposed right broadly as a right of procreative choice, thereby seeking to inextricably link abortion and procreation. *See* Bopp, *The Elusive Abortion Right*, The Nat'l L.J., June 12, 1989, at 13, col. 1 (discussing this flawed analysis at length and Justice Scalia's rejection of the contraception-abortion link). This effort was rejected by Chief Justice Rehnquist who refocused the issue on the narrow, concrete issue of abortion in his response: "[S]urely abortion was regulated by the states in the 19th century and in the 20th century?" He continued, "If you say there is a deeply rooted tradition in this area, that suggests that there had been no legislative intervention to me. . . . [T]hat simply is not the fact." *Transcript of Oral Arguments Before the Court on Abortion Case*, N.Y. Times, April 27, 1989, at B13, col. 3.

From these comments and from the historical facts, it is evident that there is no fundamental constitutional right to abortion, using the now-controlling historical test, and the majority on this Court no longer recognizes a fundamental right to abortion. This is evident from this Court's recent cases, in which it has abandoned the analysis required by *Roe v. Wade*.

CONCLUSION

The "right to abortion," whatever its constitutional dimensions, only arises under the Fourteenth Amendment. It therefore is only protected against state action which has not been alleged herein. Further, Section 1985(3) has traditionally provided a remedy only for violations of fundamental rights, not mere liberty interests. Under this Court's jurisprudence the right to abortion is only a liberty interest, not a fundamental right. This Court's characterization of the right as a liberty interest is consistent with its own precedent in making such determinations.

For the above reasons, this Court should find that Section 1985(3) does not protect a "right to abortion" against violation by private parties.

Respectfully submitted,

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